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16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18 EUREKA DIVISION

19 FRIENDS OF OUTLET CREEK, an
20 unincorporated association,

21 Plaintiff,

22 v.

23 GRIST CREEK AGGREGATES, LLC

24 Defendant.

CASE NO. 1:16-cv-431

25 **COMPLAINT FOR CIVIL PENALTIES
26 AND INJUNCTIVE AND DECLARATORY
27 RELIEF**

28 Federal Water Pollution Control Act
33 U.S.C. §§ 1251 *et seq.*
(CWA)

1 Plaintiff FRIENDS OF OUTLET CREEK ("Friends") alleges:

2 **JURISDICTION AND VENUE**

3 1. This is a civil suit brought under the citizen suit enforcement provisions of the Clean Water Act
4 ("CWA"), 33 U.S.C. §§ 1251, *et seq.* This Court has subject matter jurisdiction over the parties and the
5 subject matter of this action pursuant to 33 U.S.C. § 1365(a)(1)(A) (citizen suit provision) and 28 U.S.C.
6 § 1331 (an action arising under the laws of the United States).

7 2. On October 16, 2015, Friends provided notice of Defendant Grist Creek Aggregate, LLC's
8 ("GCA") violations of the CWA and of its intention to file suit against GCA to the Administrator of the
9 United States Environmental protection Agency ("EPA"), Lisa Jackson; the Administrator of EPA
10 Region IX, Jared Blumenfeld; the Executive Director of the State Water Resources Control Board
11 ("State Water Board"), Thomas Howard; the Executive Officer of the North Coast Regional Water
12 Quality Control Board, Matthias St. John; and to GCA's registered Agent for Service of Process, Brian
13 Hurt, as required by 33 U.S.C. § 1365(b)(1)(A). A true and correct copy of the October 16, 2015 Notice
14 Letter ("Notice Letter") is attached as "Exhibit A" and incorporated by reference herein.

15 3. Venue is proper in the Northern District of California pursuant to 33 U.S.C. § 1365(c)(1) because
16 the source of the CWA violations is located within this judicial district. Pursuant to Local Rule 3-2(f),
17 intradistrict venue is proper in Eureka, California, because the source of the violations is located within
18 Mendocino County.

19 **PARTIES**

20 4. Friends is an unincorporated citizen group located in Willits, California, at 39151 Helms Road,
21 Willits, CA, 95490, (707) 841-7940. The mission and focus of Friends is to preserve and protect the
22 natural beauty and balance of Outlet Creek, a tributary to the Eel River. Friends' members use and enjoy
23 the waters of the Outlet Creek, and its tributaries and receiving waters, and other area waters for various
24 recreational, educational, spiritual, and aesthetic benefits and purposes.

25 5. Friends' members' use and enjoyment of the waters of the Outlet Creek, the Eel River, and their
26 tributaries are adversely impacted by GCA's asphalt production plant. Pollutants, polluted storm water,
27 non-storm water discharges, and discharges of fill from Defendant's property enter Outlet Creek and
28 Corral Creek, tributaries to the Eel River, all considered waters of the United States (collectively

1 "Receiving Waters"). These discharges degrade water quality and harm aquatic life in the Receiving
2 Waters.

3 6. Defendant Grist Creek Aggregates, LLC ("GCA," or "Owners and/or Operators") holds a permit
4 to construct and operate a hot mix asphalt plant at 37342 Covelo Road in Willits, California, located
5 approximately 2.5 miles east of Highway 101 extending along the north side of State Highway 162
6 between the highway and Outlet Creek in Mendocino County ("Longvale Facility"). GCA also owns
7 and operates a rock crushing operation at the same location. Plaintiff is informed and believes, and on
8 that basis alleges that this property is legally known as APN 036-190-26, Mendocino County
9 ("Longvale Site"). GCA is permitted to process 45,000 tons of asphalt per year, with daily production of
10 3,000 tons. The Registered Agent for Grist Creek Aggregates is Brian Hurt, 25200 Fairbanks Lane,
11 Covelo, CA 95428.

12 7. The Longvale Facility Owners and/or Operators and GCA have discharged and continue to
13 discharge pollutants unlawfully from the Longvale Facility into the Receiving Waters. As explained
14 herein, the Longvale Facility Owners and/or Operators, including GCA, are liable for violations of the
15 Clean Water Act.

16 **STATUTORY BACKGROUND**

17 8. Under CWA section 402 a person may not discharge dredged or fill materials to waters of the
18 United States without a Clean Water Act section 404 Permit. 33 U.S.C. §§ 1342(a), 1344. Section 404
19 permits are issued and administered by the United States Army Corps of Engineers. *See* 33 C.F.R. §§
20 323.1-323.6. Any deposit of dredged or fill material into waters of the United States in the absence of
21 coverage under an individual or general Section 404 permit is a violation of the Clean Water Act. 33
22 U.S.C. §§ 1311(a), 1342(a), 1344.

23 9. Among other requirements, before commencement of any activity causing the dredge or fill of
24 materials into Waters of the United States, an applicant must demonstrate that there is no practicable
25 alternative to the proposed discharge that would have less adverse impact on the aquatic ecosystem, and
26 that adverse effects are avoided and/or mitigated. *See* 40 C.F.R. §§ 230.1-230.98.

1 10. Section 301 (a) of the CWA expressly prohibits the "discharge of any pollutant" unless such
2 discharges comply with the terms of any applicable NPDES permit, and sections 301, 302, 307, 308, and
3 402 of the CWA. 33 U.S.C. §§ 1311(a)(1), 1342.

4 11. "Discharge of a pollutant" means any "addition of a pollutant to navigable waters from any point
5 source." 33 U.S.C. § 1362(12).

6 12. Pollutant is defined to include "industrial, municipal, and agricultural waste discharged into
7 water." 33 U.S.C. § 1362(6).

8 13. A point source is "any discernable confined and discrete conveyance," 33 U.S.C. § 1362(14), and
9 navigable waters are broadly defined as "the waters of the United States." 33 U.S.C. § 1362(7).

10 14. NPDES permits include both general permits, which are issued under 40 C.F.R. § 122.28,
11 authorizing a category of discharges under the CWA within a geographical area, and individual permits,
12 which are issued to specific facilities.

13 15. NPDES permits must include conditions that will ensure compliance with the CWA. At a
14 minimum, NPDES permits must include technology-based effluent limitations, any more stringent
15 limitations necessary to meet water quality standards, and monitoring and reporting requirements. *See*
16 33 U.S.C. §§ 1342, 1311, 1318. NPDES permits must also implement and comply with all applicable
17 TMDLs, including the temperature and sediment TMDL adopted for the Eel River and Outlet Creek.

18 16. CWA § 402 requires each discharger to meet minimum technology-based treatment
19 requirements. Section 402 states that all permits must meet all applicable requirements under CWA §
20 301. 33 U.S.C. § 1342(a)(1). Section 301, in turn, requires all discharges to achieve, at a minimum, best
21 practicable control technology ("BPT"). 33 U.S.C. § 1311(b)(1)(a).

22 17. Discharges of toxic pollutants must be treated pursuant to the best available technology ("BAT"),
23 33 U.S.C. § 1311 (b)(2)(A), and other pollutant discharges must comply with best conventional
24 technology ("BCT"). 33 U.S.C. § 1311(b)(2)(E).

25 18. Municipal stormwater must be treated to the "maximum extent practicable." 33 U.S.C. §
26 1342(p).

27 19. Each of these treatment categories is translated into effluent limitations, which must be reflected
28 in permits as restrictions on rates quantities, and concentrations of pollutants.

20. In addition to implementing technology-based controls, each point source discharger must achieve "any more stringent limitation necessary to meet water quality standards[.]" 33 U.S.C. § 1311(b)(1)(C). Water quality standards establish the water quality goals for a water body. 40 C.F.R. § 131.2. They serve as the regulatory basis for the establishment of water quality-based controls over point sources, as required under § 301 and § 306 of the CWA. Once water quality standards are established for a particular water body, any NPDES permit authorizing discharges of pollutants into that water body must ensure that the applicable water quality standard will be met. 33 U.S.C. § 1311 (b)(1)(C); 40 C.F.R. §§ 122.4(d), 122.4(i), 122.44(d).

21. Although EPA is the primary administrator of the CWA, § 402 of the CWA authorizes EPA to delegate its authority to states to implement and administer the CWA. 33 U.S.C. § 1342(b). Pursuant to this provision, California has authority to regulate discharges of pollutants by, among other actions, issuing NPDES permits to dischargers. The State Water Resources Control Board and the nine Regional Water Quality Control Boards, including the Regional Water Quality Control Board, North Coast Region ("Regional Board"), are the California agencies bearing responsibility for issuing NPDES permits.

22. Federal regulations define storm water as "storm water runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. § 122.26(b)(13). Storm water can become process wastewater if it comes into direct contact with the materials, finished product byproduct, or waste product of a manufacturing process. *Id.*

23. Permits issued for storm water or process wastewater discharges must meet all requirements of sections 301 and 402 of the CWA.

24. The Clean Water Act does not distinguish between those who add and those who convey what is added by others—the Act is indifferent to the originator of water pollution. The Clean Water Act bans the discharge of any pollutant by any person regardless of whether that person was the root cause or merely the current superintendent of the discharge. Once regulated by an NPDES permit, discharges must strictly comply with all of the terms and conditions of that permit.

25. Violators are subject to enforcement actions initiated by EPA, states, and citizens. 33 U.S.C. §§ 1319, 1365(a). Section 505 of the CWA authorizes citizens to bring suit against any person, including a

1 corporation, who is alleged to be in violation of an effluent standard or limitation under the CWA. 33
 2 U.S.C. § 1365(a). Effluent limitation is defined broadly to include "a permit or condition thereof issued
 3 under [section 402] of this title," and "any unlawful act under subsection (a) of [section 301] of this
 4 title." 33 U.S.C. § 1365(f). *See also Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526 (9th
 5 Cir. 2001) (holding that citizens may bring suit against a party discharging pollutants into waters of the
 6 United States without a NPDES permit). Section 309 of the CWA, 33 U.S.C. § 1319(d), adjusted by 40
 7 C.F.R. § 19.4, provides for civil penalties of up to \$37,500 per day per violation.

8 26. Section 402(p) of the CWA establishes a framework for regulating industrial storm water
 9 discharges under the NPDES program. 33 U.S.C. § 1342(p). States with approved NPDES permit
 10 programs are authorized by Section 402(p) to regulate industrial storm water discharges through
 11 individual permits issued to dischargers and/or through the issuance of a single, statewide general permit
 12 applicable to all industrial storm water dischargers. 33 U.S.C. § 1342(p).

13 27. On July 1, 2015, California State Water Board statewide General Permit No. CAS000001
 14 ("General Stormwater Permit"), Water Quality Order No. 2014-0057-DWQ, became effective. The
 15 General Stormwater Permit applies to all industrial stormwater discharges requiring a permit. To obtain
 16 coverage under the General Stormwater Permit, site operators must submit a Notice of Intent ("NOI"),
 17 and must develop and implement an industrial Stormwater Pollution Prevention Plan ("SWPPP").

18 28. The Water Quality Control Plan for the North Coast Region ("Basin Plan") establishes Water
 19 Quality Objectives for Inland Surface Waters such as Outlet Creek, Corral Creek, and the Eel River.
 20 These Water Quality Objectives require that all applicable waters be maintained free of toxic substances,
 21 alone or in combination, in concentrations that produce detrimental physiological responses in human,
 22 plant, animal or aquatic life. These Water Quality Objectives are intended to protect Beneficial Uses of
 23 Surface Waters, including municipal drinking water, wildlife habitat, freshwater habitat, and in-water
 24 recreation.

25 29. The Regional Water Board adopted the Basin Plan which establishes water quality objectives,
 26 designates beneficial uses, and contains implementation plans and policies to achieve those objectives
 27 for all waters addressed within the plan, including the Receiving Waters.

30. Further, State Water Board Resolution No. 88-63 requires that the Regional Water Board assign the municipal and domestic supply use to water bodies that do not have beneficial uses listed in the Basin Plan.

31. The beneficial uses of Eel River Hydrological Unit and Outlet Creek are water contact recreation (REC-1), warm freshwater aquatic habitat (WARM), cold freshwater aquatic habitat (COLD), spawning habitat (SPWN), wildlife habitat (WILD), municipal and domestic water supply (MUN), and others. *See* Basin Plan at Table 2-1.

32. The beneficial uses of downstream waters are imputed to upstream tributaries in order to protect the beneficial uses of the downstream waters as well. The Basin Plan sets Water Quality Standards (“WQS”) intended to control activities that can adversely affect aquatic systems and to protect these beneficial uses, including, but not limited to, standards for oil and grease, pH, and heavy metals such as copper, lead, mercury, nickel, and zinc.

33. The North Coast Regional Water Quality Control Board has also adopted a Total Maximum Daily Load (“TMDL”) for temperature and sediment for the Eel River and Outlet Creek. The TMDL describes how trout and salmon populations in the Receiving Waters have declined over recent years, and describes how elevated temperatures and sedimentation have caused and contributed to these conditions. The TMDL sets forth load allocations for temperature and sediment that must be maintained in the Receiving Waters

FACTUAL BACKGROUND

34. Outlet Creek, Corral Creek, and the Eel River are ecologically sensitive areas. Although pollution and habitat destruction have diminished the Receiving Water’s varied wildlife, these waters are still essential habitat for dozens of fish and bird species as well as macro-invertebrate and invertebrate species. Polluted storm water and non-storm water contaminated with sediment, heavy metals, and other pollutants harm the special aesthetic and recreational significance that Outlet Creek, Corral Creek, and the Eel River have for people in the surrounding communities. The public’s usage of the Receiving Waters for contact sports exposes many people to toxic metals and other contaminants from these polluted discharges. Non-contact recreational and aesthetic opportunities, such as wildlife observation, are also damaged by the illegal contaminated discharges.

1 35. Plaintiff is informed and believes, and thereon alleges that the Longvale Facility is an
2 approximately 17-acre privately-operated aggregate processing and asphalt production facility.

3 36. Plaintiff is informed and believes, and thereon alleges that the Longvale Facility has conducted
4 asphalt production activities and operations on site since on or about June 2, 2015, and, prior to that
5 time, has conducted industrials activities including but not limited to aggregate processing, storage, and
6 transfer; aggregate wash operations; and concrete recycling – activities that continue to the present.

7 37. Plaintiff is informed and believes, and thereon alleges that the Longvale Facility Owners and/or
8 Operators connected an extension through the Longvale Facility to a highway storm drain culvert to
9 separate industrial site water from off-site stormwater (hereafter “Drain Pipe”). The Longvale Facility
10 Owners and/or Operators discharge pollutants through the Drain Pipe from the Caltrans municipal
11 separate storm sewer system (“MS4”), which includes roads with drainage systems, gutters, ditches,
12 man-made channels and storm drains owned or operated by the State, to Outlet Creek, and the Eel River,
13 waters of the United States, from at least one discharge points, according to the Longvale Gravel Plant
14 Industrial Storm Water Pollution Prevention Plan (“SWPPP”) dated June 2015, as amended November
15 9, 2015.

16 38. Plaintiff is informed and believes, and thereon alleges that the Longvale Facility Owners and/or
17 Operators have never submitted an Application/Report of Waste Discharge General Information Form
18 for Waste Discharge Requirements or NPDES Permit (“Application”) to obtain NPDES Permit coverage
19 for the Drain Pipe.

20 39. Plaintiff is informed and believes, and thereon alleges that the discharges of polluted storm water
21 from off-site and flowing through the property Drain Pipe include highway surface materials such as
22 fine particles of asphalt and concrete, highway maintenance products, erodible shoulder materials,
23 eroding cut and filled slopes, abrasive sand, abraded rubber tires, tracked and drifted industrial
24 pollutants, fluids from accidents and spills, heavy metals from brakes and materials hauled on roads, and
25 landscape care products.

26 40. Plaintiff is informed and believes, and thereon alleges that such materials and wastes include, but
27 are not limited to, pollutants falling into the following categories: metals (such as copper, lead, and
28 zinc); synthetic organic compounds (pesticides); polycyclic aromatic hydrocarbons (PAHs) from vehicle

1 emissions; antifreeze, coolant, oil, and grease; total petroleum hydrocarbons (TPH); sediment; nutrients
2 (nitrogen and phosphorous fertilizers); debris (trash and litter); pathogens; and oxygen demanding
3 substances (decaying vegetation, animal waste, and other organic matter). Many of these pollutants are
4 on the list of chemicals published by the State of California as known to cause cancer, birth defects,
5 developmental, or reproductive harm.

6 41. Plaintiff is informed and believes, and thereon alleges that oil and grease, transmission and
7 vehicle fluids (such as antifreeze and gasoline), metal particles, and other pollutants have been and
8 continue to be tracked onto and throughout Highway 162.

9 42. Plaintiff is informed and believes, and thereon alleges that these materials can be tracked
10 throughout Highway 162 because the trucks and vehicles leaving the Longvale Facility are pollutant
11 sources tracking sediment, dirt, ash, oil and grease, metal particles, and other pollutants off-site.

12 43. Plaintiff is informed and believes, and thereon alleges that these pollutants are entrained in
13 stormwater discharging from Highway 162, and the Facility Drain Pipe.

14 44. Plaintiff is informed and believes, and thereon alleges, that Longvale discharges pollutants from
15 the Drain Pipe without application of stormwater treatment technology required by the Clean Water Act.

16 45. Plaintiff is informed and believes, and thereon alleges that Longvale has discharged fill materials
17 to Corral Creek and Outlet Creek without 404 permit coverage. Areas of unauthorized discharge/fill
18 include, but are not limited to: discharge/placement of soil and gravel to both the northern and southern
19 daylight portions of the Corral Creek culvert transecting the Facility; and discharge/placement of soil
20 and gravel in the form of, and from, the earthen and gravel berm spanning the North/Northwest
21 boundary of the Facility.

22 **FIRST CAUSE OF ACTION**

23 **Unlawful Discharge Without CWA NPDES Permit, 33 U.S.C. §§ 1311(a), 1342**

24 46. Plaintiff incorporates by reference each and every paragraph of this Complaint as though they
25 were set forth in full herein.

26 47. Plaintiff is informed and believes, and thereon alleges that Defendant GCA has been discharging
27 pollutants from the Longvale Facility through the Drain Pipe into the Receiving Waters, Outlet Creek
28 and the Eel River, since the date operations at the facility began.

1 48. Parties discharging pollutants from a point source into navigable waters must obtain a NPDES
2 permit before committing any such discharge. 33 U.S.C. § 3111(a) prohibits the discharge of any
3 pollutant from any point source to waters of the United States, except those discharges allowed by a
4 NPDES permit issued pursuant to 33 U.S.C. § 1342.

5 49. Plaintiff is informed and believes, and thereon alleges that GCA has never obtained an NPDES
6 permit to discharge pollutants from the Longvale Facility through the Drain Pipe into the Receiving
7 Waters.

8 50. Therefore, GCA is in violation of the Clean Water Act because it has failed to obtain a NPDES
9 permit for this discharges of pollutants.

10 51. This violation is not a wholly past violation, is capable of repetition, and is therefore enforceable
11 in this citizen suit action because this violation and other ongoing and continuous violations result from
12 the same underlying and inadequately resolved causes.

13 **SECOND CAUSE OF ACTION**

14 **Discharge of Fill Materials Without Section 404 Permit, 33 U.S.C. §§ 1311(a), 1342, 1344**

15 52. Plaintiff incorporates by reference each and every paragraph of this Complaint as though they
16 were set forth in full herein.

17 53. Plaintiff is informed and believes, and thereon alleges that GCA has been discharging dredge
18 and/or fill material from the Longvale Facility to both the northern and southern daylight portions of the
19 Corral Creek culvert transecting the Facility Corral Creek since the date operations at the facility began.

20 54. Plaintiff is informed and believes, and thereon alleges that GCA has never obtained a Section
21 404 permit from the U.S. Army Corps of Engineers to discharge dredge and/or fill material from the
22 Longvale Facility into the Receiving Waters.

23 55. Any deposit of dredge or fill material into waters of the United States in the absence of coverage
24 under an individual or general Section 404 permit is a violation of the Clean Water Act. 33 U.S.C. §§
25 1311(a), 1342(a), 1344.

26 56. Therefore, GCA is in violation of the CWA because it discharges dredge and/or fill material into
27 navigable waters without a Section 404 permit.

57. This violation is not a wholly past violations, is capable of repetition, and is therefore enforceable in this citizen suit action because this violation and other ongoing and continuous violations result from the same underlying and inadequately resolved causes.

THIRD CAUSE OF ACTION

Discharge of Fill Materials Without Section 404 Permit, 33 U.S.C. §§ 1311(a), 1342, 1344

58. Plaintiff incorporates by reference each and every paragraph of this Complaint as though they were set forth in full herein.

59. Plaintiff is informed and believes, and thereon alleges that GCA has been discharging soil and gravel in the form of, and from, the earthen and gravel berm spanning the North/Northwest boundary of the Facility, from the Longvale Facility, into Outlet Creek since the date of construction of the berm.

60. Plaintiff is informed and believes, and thereon alleges that GCA has never obtained a Section 404 permit from the U.S. Army Corps of Engineers to discharge dredge and/or fill material from the Longvale Facility into the Receiving Waters.

61. Any deposit of dredge or fill material into waters of the United States in the absence of coverage under an individual or general Section 404 permit is a violation of the Clean Water Act. 33 U.S.C. §§ 1311(a), 1342(a), 1344.

62. Therefore, GCA is in violation of the CWA because it discharges dredge and/or fill material into navigable waters without a Section 404 permit.

63. This violation is not a wholly past violations, is capable of repetition, and is therefore enforceable in this citizen suit action because this violation and other ongoing and continuous violations result from the same underlying and inadequately resolved causes.

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays as follows:

1. Wherefore, Plaintiff respectfully request that this Court grant the following relief:

- a. A Court order declaring Defendant to have violated and to be in violation of Sections 301(a), 402, 404 of the CWA, 33 U.S.C. §§ 1311(a), 1342, 1344, for its unlawful dredge and fill of materials into Waters of the United States in violation of the substantive and procedural requirements of the CWA;

1 b. A Court order enjoining Defendant from further violating the substantive and procedural
2 requirements of the Sections 301(a), 402, 404 of the CWA, 33 U.S.C. §§ 1311(a), 1342, 1344,
3 for its unlawful dredge and fill of materials into Waters of the United States;

4 c. A Court order declaring Defendant to have violated and to be in violation of Sections
5 301(a), and 402 of the CWA, 33 U.S.C. §§ 1311(a), 1342, for its unlawful discharge of
6 stormwater and non-stormwater materials into Waters of the United States in violation of the
7 substantive and procedural requirements of the CWA;

8 d. A Court order enjoining Defendant from further violating the substantive and procedural
9 requirements of the Sections 301(a), and 402 of the CWA, 33 U.S.C. §§ 1311(a), 1342, for its
10 unlawful discharge of stormwater and non-stormwater materials into Waters of the United
11 States;

12 e. A Court order assessing civil monetary penalties for each violation of the CWA at
13 \$37,500 per day per violation for violations occurring since on or around May 1, 2011, as
14 permitted by 33 U.S.C. § 1319(d) and Adjustment of Civil Monetary Penalties for Inflation, 40
15 C.F.R. § 19.4;

16 f. A Court order awarding Plaintiff their reasonable costs of suit, including attorney,
17 witness, expert, and consultant fees, as permitted by Section 505(d) of the Clean Water Act, 33
18 U.S.C. § 1365(d), and any other applicable provisions of law; and

19 g. Any other relief as this Court may deem equitable, just and appropriate.
20

21 DATED: January 25, 2016

GREENFIRE LAW

22
23 By: /S/Rachel S. Doughty
24 RACHEL S. DOUGHTY
25 Attorneys for Plaintiff
26 Friends of Outlet Creek
27
28